86-685

Supreme Court, U.S.
FILED
OCT 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES E. CRISWELL,

Petitioner,

v.

BALTIMORE & OHIO RAILROAD COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS FOR REVIEW

I. Whether the District Court denied petitioner a fair trial by: (1) its evidentiary rulings which permitted the admission into evidence of the CJ68 form as an admission against interest of petitioner despite overwhelming evidence that it did not constitute such an admission, and (2) compounding, its error through the court's own subsequent actions?

II. Whether the District Court and the Fourth Circuit Court of Appeals effectively denied petitioner his Seventh Amendment, Constitutional right to a jury trial?

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OPINION OF THE COURT BELOW

The unpublished Opinion of the U.S. District Court for the District of

Maryland and its Order granting respondent's Motion for Judgment Notwithstanding the Verdict are set forth verbatim in the appendix at pages 8 - 22. The unpublished opinion of the U.S. Court of Appeals for the Fourth Circuit is set forth verbatim in the appendix at pages 1 - 4.

PETITION FOR WRIT OF CERTIORARI

The Petitioner, James E. Criswell, by Arnold, Beauchemin & Tingle, P.A., Norris W. Tingle, Richard R. Beauchemin, and Geoffrey J.C. Boyd, his attorneys, respectfully requests that a Writ of Certiorari issue to review the per curiam decision of the United States Court of Appeals for the Fourth Circuit in the instant case. James E. Criswell v. The Baltimore & Ohio Railroad Company, Inc., No. 85-1769 (C.A. 4 Aug.

5, 1986).

JURISDICTIONAL GROUNDS

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

Constitutional Provisions
United States Constituion,
Seventh Amendment

In Suits at common law, where the value in controversey shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States than according to the rules of the common law.

Statutes

45 U.S.C., Sec. 51

> Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence;

definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed,

works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; August 11, 1939, c. 685, Sec. 1, 53 Stat, 1404.

45 U.S.C., Sec. 53.

Contributory negligence; diminution of damages.

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such

injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

April 22, 1908, c. 149, Sec. 3, 35 Stat. 66.

45 U.S.C., Sec. 54. Assumption of risks of employment.

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case

where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

April 22, 1908, c. 149, Sec. 4, 35 Stat. 66; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat 1404.

45 U.S. C., Sec. 55. Contract rule, regulation, or device exempting from liability; set-off.

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this

chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

April 22, 1908, c. 149, Sec. 5, 35 Stat. 66.

STATEMENT OF THE CASE

Petitioner, James E. Criswell, an employee of the Baltimore & Ohio Railroad Company, had his left hand blown off by a "pipe" bomb which he found and picked up on December 11, 1981, while he was at work upon his employer's premises. Mr. Criswell ultimately filed a claim under the Federal Employer's Liability Act (The F.E.L.A.), 45 U.S.C., Sec. 51 et seq.,

in the United States District Court for the District of Maryland on February 27, 1984, seeking compensation for lost wages and personal injury from his employer, the B & O. The matter was tried on April 29th through May 2nd, 1985 before a jury which returned a verdict on behalf of the employee in the amount of $500,000.00. The jury found that the employer, B & O was 12% negligent and that the employee was 88% negligent. Accordingly, on May 3, 1985, judgment was entered in favor of employee and against the B & O in the sum of Sixty Thousand ($60,000.00) Dollars.

On or about May 13, 1985, a Motion for Judgment Notwithstanding the Verdict was filed by the B & O, to which Criswell filed a timely answer. A

hearing on the Motion was held on June 7, 1985, at the conclusion of which the court, in an oral opinion, granted the B & O's Motion for Judgment Notwithstanding the Verdict. From the verdict of the jury and the grant of the B & O's Motion for Judgment Notwithstanding the Verdict, Criswell filed a timely appeal. The issues were briefed and oral argument had on May 5, 1986, before a three judge panel in the U.S. Court of Appeals for the Fourth Circuit. An unpublished, per curiam, one page opinion was issued on August 5, 1986, in which the Court of Appeals affirmed the grant of a judgment notwithstanding the verdict in favor of the Defendant/Appellee, B & O, based upon the District Court's determination that the fabrication of bombs was not

reasonably foreseeable. As a result of the affirmation of the grant of the j.n.o.v., the appellant, James C. Criswell has filed a timely petition for Writ of Certiorari.

ARGUMENT

The U.S. District Court for the District of Maryland in its determination of this case has clearly violated the tenets laid down by this Court in Rogers v. Missouri Pac. R.R. Co., 352 U.S. 500 (1957) and Gallick v. B & O R.R. Co., 372 U.S. 108 (1963), and the affirmance by the U.S. Court of Appeals for the Fourth Circuit has so far sanctioned this violation of the tenets of this Court as to necessitate the exercise of this Court's supervisory power so as to insure uniformity of decision under the Federal Employer's

Liability Act, 45 U.S.C., Sec. 51 et. seq. (the "F.E.L.A.").

I. PETITIONER WAS DENIED A FAIR TRIAL BY THE COURT AS A RESULT OF (1) ITS RULING WHICH PERMITTED THE ADMISSION INTO EVIDENCE OF THE "CJ68" INCIDENT REPORT AS AN ADMISSION AGAINST INTEREST DESPITE OVERWHELMING EVIDENCE THAT THE DOCUMENT COULD NOT CONSTITUTE SUCH AN ADMISSION, AND (2) ITS ACTIONS, WHICH GAVE THE IMPRIMATURE OF APPROVAL BY THE COURT, TO THE JURY.

The right to a fair trial by jury which is guaranteed under the Seventh Amendment to the Constitution of the United States,

> ...is a basic and fundamental feature of our system of federal jurisprudence. [citation omitted]. It is a part and parcel of the remedy

> afforded railroad workers under the Employers' Liability Act.
>
> * * *
>
> To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.

Bailey v. Central Vermont Ry., Inc., 319 U.S. 350, 354 (1943); Blair v. Baltimore & Ohio R.R. Co., 323 U.S. 600, 602 (1945); Rogers v. Missouri Pac. R.R. Co., 352 U.S.500 (1957).

In the instant case, the B & O employee report of accident (form CJ68), filled out by the railroad's safety officer, was admitted into evidence as an admission against interest of petitioner and was used by the railroad as a device to exculpate itself from

liability in violation of 45 U.S.C., Sec. 55.

Rinaldi, the railroad's safety officer visited the 26 year old petitioner in his hospital room, two and one half days after the emergency surgical amputation above the wrist of the fragmented remains of petitioner's left hand, which had been blown off by a pipe bomb constructed by a fellow employee. At the time of the safety officer's visit, petitioner was still regularly receiving injections of narcotic analgesics for pain and, petitioner's own testimony established that he did not have the state of mind to understand the significance of his signature on the CJ68 form (Employee's Report Covering Injury or Occupational Illness) which the safety officer

requested him to sign. Petitioner's lack of ability to appreciate the significance of his actions is further borne out by the fact that his signature appears scrawled, between the lines of the safety officer's hand-written narrative, in the middle of the page, instead of on the signature line at the bottom of the page where it was intended that it should be placed. The form was filled out entirely by the safety engineer, without the presence of witnesses as required by the instructions upon the form itself. The petitioner never read the narrative of the incident in which he lost his hand as recorded on the CJ68 form and recanted that version of the facts shortly afterward when he was no longer under the influence of narcotic drugs.

The overwhelming evidence of the blatant falsity of the document in regard to both its content and its execution should have prevented it from being admitted into evidence at trial for any purpose whatsoever, however, the trial court denied petitioner's motion in limine asserting inadmissability and prejudice, and presented the form to the jury representing it as an admission of the petitioner. The presentation of this form into evidence as an admission against interest was a gross and outrageous perversion of the evidence and was highly prejudicial to appellant's case. The prejudical effect of this document upon the jury is reflected in the finding by the jury of 88% contributory negligence on the part

of petitioner, after having rendered a verdict in favor of petitioner in the amount of five hundred thousand dollars.

The trial court further compounded this gross perversion of the evidence through the trial judge's command in the presence of the jury, that his clerk personally photocopy the form and distribute the copies of the CJ68 to each of the jurors, thereby, through its eager embracing of the document, placing the court's approval and imprimature of legitimacy upon the document. The unfair and prejudicial effect upon the jury of the admission of this document into evidence as an admission against interest of petitioner, acted to deny petitioner a fair trial of the matters at issue.

The CJ68 form itself clearly

constitutes a violation of 45 U.S.C., Sec. 55 which states, in pertinent part, that:

> Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter shall to that extent be void...

The CJ68 form in numbered items, ten through fourteen, does not seek to merely solicit the facts surrounding the incident, but rather, seeks responses by the injured employee to questions which have the specific legal effect of exempting the railroad from liability, despite its negligence. Completion of the form by the injured employee is mandatory under the railroad's general safety rule number one, and the form is

to be completed as soon as possible after the accident/incident. The injured employee, who is primarily concerned with his job security and his own well being, ordinarily does not have the benefit of counsel when completing the CJ68 form, while the form itself was clearly designed by someone with an intimate familiarity with the legal issues involved in a personal injury claim under the F.E.L.A. The form, for example, in item ten, asks (A) Was anyone at fault? (B) If so, who, and in what manner?" Item eleven asks "(A) Was equipment or tool defective? (B) If so, describe and specify defect." Item twelve asks "(A) Did injured/occupationally ill person have a safe place in which to work?" Item thirteen asks "(A) Was work place

adequately lighted? (B) If not, describe conditions." Item fourteen asks "Was there any failure to give usual or necessary signals, warnings, or protection?"

The answers to these questions strike straight at the heart of the legal issues involved in an injured employee's claim under the F.E.L.A. and are used against the injured employee, as defenses by the railroad, to typical allegations of negligence on the part of the employer. The prejudicial misuse of the CJ68 form in this case, as an admission against interest of petitioner, in which answers were manufactured by the employer's safety engineer after a signature had been obtained under abusive circumstances from the injured petitioner, was clearly

prejudicial error. Its effect was reflected in the finding by the jury of 88% contributory negligence on the part of petitioner.

II. PETITIONER WAS EFFECTIVELY DENIED HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL THROUGH THE GRANT OF THE B & O'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BY THE U.S. DISTRICT COURT FOR THE DISTRICT OF MARYLAND AND THROUGH THE AFFIRMANCE OF THAT ACTION BY THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT.

The grant of the B & O's Motion for Judgment Notwithstanding the Verdict ("J.N.O.V.") based upon the Court's determination of (1) a lack of foreseeability of harm and (2) that petitioner was not within the scope of his employment when injured, improperly

invaded the jury's historic function and effectively denied to petitioner his Seventh Amendment, Constitutional right to a jury trial, and deprived him of "a goodly portion of the relief which Congress has afforded [him under the F.E.L.A.]. Bailey v. Central Vermont Ry., Inc., 319 U.S. 350, 354 (1943). The District Court stated the correct standard in its oral, bench opinion for the grant of a motion for J.N.O.V., but then failed to apply that standard when it stated that:

> [t]he commentators indicate that the stringent standards for judgment notwithstanding the verdict pursuant to F.R. Civ. P. 50 are even more difficult to meet in an F.E.L.A. case
>
> See 9 Wright & Miller, Federal Practice and Procedure, Sec. 2526.

The test of whether an F.E.L.A. case should be submitted to the jury is simply

> whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made

> out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or in part to its negligence.'

Rogers v. Missouri Pac. Ry., 352 U.S. 500, 506 (1957). There are, thus only very limited circumstances in which the court can substitute its judgment, as a matter of law, for the verdict of the jury in an F.E.L.A. case. The District Court, erroneously, proceeded to do precisely that - to substitute its judgment, as a matter of law, for the verdict of the jury, despite the fact that there was evidence to substantiate the jury's verdict. In its summary of the evidence in its oral opinion granting the motion for J.N.O.V., the court failed to even consider

substantial evidence which was favorable to the plaintiff and, when viewed objectively, clearly appears to have viewed the relevant evidence, erroneously, in the light most favorable to the movant, the B & O.

With regard to the issue of scope of employment, the court failed to consider the following: (1) that the heavy work being performed required two or three man gangs in order to be safely and properly performed; (2) that petitioner's gang leader had instructed him that he was to "hang loose, stick around. We are not going to do a whole lot today"; (3) that petitioner, in accordance with his gang leader's instructions, remained on the premises, on the jobsite, and on the payroll of B & O while awaiting further orders from

his gangleader; (4) that while awaiting such instruction, he occupied his time by picking up scrap metal material which littered the workyard; (5) there was absolutely no evidence presented whatsoever, that he was not ready, willing and able to resume work whenever his workleader indicated that the rest of his work gang was ready to proceed.

With regard to the issue of foreseeability of harm, the court specifically found "that a jury could rationally infer that B & O did not use reasonable care in storing the torpedos."1

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1 "A railroad torpedo is a coated brown paper package, two inches square and a half inch thick, with a strip of metal running through it to hold it in place on a railroad track. The package contains an explosive charge and sand. When it is affixed to a track it is detonated - in a sense ignited - by the

Its summary of the evidence on this issue included: (1) that management was aware of horseplay during the week preceding the accident, (2) that a foreman broke up a rock battle among the employees, (3) that the employees were not supervised during the week preceding the accident, (4) that the employees did not always have work to occupy them, (5) that torpedos were widely available during the period, and (6) that a number of audible explosions occurred in the sandblast area [of the workplace] in the days preceding the

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(f.n. cont'd.)
weight of the train mixing the sand with the chemicals. The explosion sounds a warning of trouble ahead to the engineer." Prata v. Nat'l. R.R. Passenger Corp., 420 N.Y.S. 2d 276 (1979).

accident. The court summarily concluded that the fabrication of an explosive device from torpedos was not reasonably foreseeable, despite management's knowledge of conventional horseplay. "Reasonable forseeability of harm is an essential ingredient of Federal Employers' Liability Act negligence." Gallick v. B & O R.R. Co., 372 U.S. 108, 117 (1963), and cases cited therein. Foreseeability of harm "is no less a matter generally left to the jury's broad decision than any other part of the requisite proof to recover under the F.E.L.A.", Gallick, supra, moreover, a jury is not compelled to find that a third-party's unlawful conduct which resulted in harm to an employee of the railroad was not foreseeable. Burns v. Penn Central Co., 519 F.2d 512, 514 (2d.

Cir. 1975), citing Lillie v. Thompson, 332 U.S. 459 (1947). In this case the harm to James Criswell was not the result of a criminal or an intentional act of a third party. There was corroborating testimony to substantiate Criswell's account of having found this piece of pipe near the shanty and of his having carried it to the boxcar in which the Martz brothers were working in order to inquire as to its nature and ownership. His injury resulted from the explosion caused by detonation of the device due to his fall in the boxcar. This, indeed, is not the first time that a railroad torpedo has blown off the hand of a railroad employee. See Prata v. Nat'l. R.R. Passenger Corp., 70 A.D. 2d 114, 420 N.Y.S. 2d 276 (1979). The jury was specifically

instructed on the issues of foreseeability of harm and scope of employment, and there was evidence which supported the jury verdict in favor of the petitioner. The District Court improperly invaded the jury's function, in direct contradiction of the legal tenets expressed by this Court, and insodoing denied petitioner his right to a jury trial, when it ruled, as a matter of law, that (1) the petitioner was not acting within the scope of his employment and (2) that the harm to petitioner was not foreseeable. See Gallick, supra. Clearly, such is an entirely too narrow and restrictive an interpretation of concepts of foreseeability and scope of employment. This is especially so in an F.E.L.A. case, in which such questions of fact

should be approached in the light of the language of Mr. Justice Butler in Jamison v. Encarnacion, 281 U.S. 635 (1930), where he declared:

"The act is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning. It is to be construed liberally to fulfill the purposes for which it was enacted, and to that end the word [negligence] may be read to include all the meanings given to it by courts, and within the word as ordinarily used."

CONCLUSION

For the aforegoing reasons, Petitioner prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fourth Circuit and that its decision and that of the

U.S. District Court for the District of Maryland be reversed.

Respectfully submitted,

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I HEREBY CERTIFY That on this 27th day of October, 1986, three copies of the aforegoing Petition for Certiorari were hand-delivered to Ransom Davis, Esquire, and Melnicove, Kaufman, Weiner, Smouse & Garbis, P.A., 36 S. Charles Street, 6th Floor, Baltimore, Maryland 21201-3060.

Richard R. Beauchemin